IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-887

A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW CROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS AND COMMITTEE FOR AN EFFECTIVE CITY COUNCIL,

Petitioners,

vs.

CITY COUNCIL OF THE CITY OF CHICAGO, RICHARD J. DALEY, individually and as Mayor of the City of Chicago, and BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO,

Respondents.

SUPPLEMENTAL BRIEF OF CITY COUNCIL OF CITY OF CHICAGO AND RICHARD J. DALEY, MAYOR, FILED PURSUANT TO SUPREME COURT RULE 24(5)

This supplemental brief is being filed, pursuant to Rule 24(5) of the Rules of this Court, in response to the supplemental brief of the petitioners, received by respondents on March 12, 1975. In that brief they urge that certiorari should

be granted herein for the additional reason that a conflict has arisen between the Fifth and Seventh Circuits as a result of the recent decision of the Fifth Circuit in *Reese* v. *Dallas County, Alabama,* 505 F. 2d (adv. sh.) 879 (Dec. 30, 1974).

Examination of the Fifth Circuit's opinion, we submit, demonstrates that any conflict between it and the Seventh Circuit's opinion here is merely academic.

The *Reese* case had to do with a challenge to the constitutionality of the districting plan for the election of county commissioners of Dallas County, Alabama. This was an at-large system. But the county was divided into four districts, and under the plan only one commissioner could be elected from each district. Three of the districts were rural, with populations of C209, 14,203 and 7505, respectively. The fourth district, containing the city of Selma, was considered urban and had a population of 27,379. The population of the urban district was thus roughly equal to that of the three rural districts combined. As a result of this arrangement, only one of the four county commissioners was a resident of the Selma district, although it had half the population of the county.

The Fifth Circuit found that the citizens of the urban district were *injured* in being forbidden to elect resident commissioners in proportion to the population of that district and that this constituted a violation of the one-person, one-vote principle.

It is to be particularly noted that, unlike the petitioners in the case at bar, the plaintiffs in *Reese* put in a prima facie case, a strong prima facie case, which included evidence, irrefutable evidence, of injury to the citizens of the urban district. The majority opinion clearly states (at 886):

> "Plaintiffs have established *a strong prima facie case* of official discrimination intended to dilute their voting strength." (Emphasis supplied.)

And in making that assessment of the plaintiffs' case, the Fifth Circuit ruled (at 884):

> "Finding an adverse effect on an identifiable group of voters is not sufficient in itself to establish dilution. The effect must be invidiously discriminatory. See *Reynolds* v. *Sims*, 377 U.S. at 561."

Concerning such a prima facie case, the Fifth Circuit expressly remarked (at 887):

> "Intentional dilution of a group's voting strength is a serious affront to the Constitution. Establishing this injury in court, however, is often very difficult."

It was only after the court had found that the plaintiffs had established a prima facie case, that it took up (at 886) the question of "[t]he standard of review by which justifications of the plan are to be judged . . ."

The Fifth Circuit then (at 886, 887) invoked the authority of *Dunn* v. *Blumstein*, 405 U.S. 330, at 335 (1972), to the effect that statutes burdening the right to vote "must meet close judicial scrutiny" and be "necessary to promote a compelling state interest." As we have already noted (Brief in Opposition, pp. 34, 35) the *Dunn* case was one in which this Court invalidated a Tennessee election statute requiring residence in the state of at least one year as a precondition of voting. There the plaintiff was deprived of the right to vote; he could not vote at all, and it was in the context of that clear deprivation of constitutional rights that this Court ruled (at 342, 343) that the statute could be justified only if the State could demonstrate that the enactment was "necessary to promote a compelling governmental interest."

In *Reese* the only justification for the county election plan that the county could urge on its behalf was that it operated to preserve "rural-urban balance" in the legislative body and thus protected "legitimate minority interests." This was no justification at all, as the Fifth Circuit declared (at 888), since adjudication had "long ago established that preservation of rural-urban balance in a legislative body is a categorically unacceptable reason for departing from the one man-one vote standard," citing *Davis* v. *Mann*, 377 U.S. 678, at 692 (1964).

Thus, the Fifth Circuit's endorsement of the "strict scrutiny" test in *Reese* was academic. The Dallas County, Alabama, election plan was unconstitutional under any test.

In addition to being academic, the *Reese* ruling, which was no more than a majority opinion of 8 out of 15 judges sitting on the case *en banc*, is also in conflict with this Court's treatment of the burden of proof issue in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), in which it said (at 143):

> "But we have insisted that the challengers carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements."

It was on the authority of *Whitcomb* and of *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967), and *White* v. *Regester*, 412 U.S. 755 (1973), that the Seventh Circuit in the case at bar concluded (Petition, p. A20):

> "We think that if the cases reveal an unwillingness of the Supreme Court to shift the 'burden of justification' (as urged by plaintiffs here) in causes involving the somewhat 'suspect' multimember districts, such an

> allocation would be even less likely in the context of a challenge to single-member districts."

This was the Seventh Circuit's answer to the petitioners' attempt to make the City prove their case for them, "to shift to the defendants the burden of establishing the absence of discrimination." (Petition, p. A19.)

The alleged conflict between the Circuits claimed in the petitioners' supplemental brief is non-existent. In *Reese* the plaintiffs put in a strong prima facie case and the county had no valid justification whatsoever for its election scheme; therefore there was no occasion to determine if the burden of proof shifted or what standard of justification of the enactment should be applied. In the instant case the petitioners failed to make out a prima facie case, and therefore there was also no occasion to determine whether the "strict scrutiny" test was applicable.

A careful examination of the respective opinions of the Fifth and Seventh Circuits in these two cases demonstrates the perspicacity of Mr. Justice Marshall's observation in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, at 98, 99 (1973):

> "A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis on which the classification is drawn."

As we have already stated in our brief in opposition, the petitioners' conception of the "strict scrutiny" test is un-

duly simplistic and mechanical. It also fails to recognize the necessity of putting in a prima facie case of invidious discrimination, including proof of damage, that is, purposeful exclusion from voting rights and political participation. The petitioners' position is not justified by any authority.

CONCLUSION

The petition for a writ of certiorari should be denied, or, in the alternative, the writ should be granted and the judgment of the court of appeals summarily affirmed.

Respectfully submitted,

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